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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1267

DALE S. COENEN,

Petitioner,

—against—

R. W. PRESSPRICH & CO., INC., and
STIRLING HOMEX CORPORATION,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondent R. W. Pressprich & Co. Incorporated ("Pressprich") submits this brief in opposition to the petition for a writ of certiorari filed herein by Dale S. Coenen ("Coenen").

Citation to Opinions Below

The opinion and order of the District Court (Pet. App. B), erroneously stated in the petition to be unreported, is reported at 329 F.Supp. 1296.

The opinion of the Court of Appeals (Pet. App. D), erroneously stated in the petition to be unreported, is reported at 453 F.2d 1209.

Question Presented

Whether a member of the New York Stock Exchange can avoid arbitration of a claim against another member arising from a securities transaction and asserted alternatively under the common law and the federal securities and antitrust laws, when

(a) the member, with full knowledge of his claim but prior to its actual assertion, joined the Exchange and pledged to obey its Constitution requiring arbitration of "any controversy" between persons who are members; and

(b) the self-regulatory mandate given to the Exchange by Congress expressly includes the settlement of disputes between members.

Statement of the Case

The Complaint Herein

In his complaint Coenen alleges that in 1968, while a director of defendent Stirling Homex Corporation ("Stirling"), he purchased 90,000 shares of its stock for investment purposes. The stock certificate issued to him contained the standard legend preventing the sale or transfer of the shares unless registered under the Securities Act of 1933, or unless Coenen produced a letter of counsel "satisfactory" to Stirling that such registration was not required. Coenen claims that "in the Spring of 1970 Coenen & Co., Inc., a broker-dealer and investment banking firm of which Coenen was and still is a principal stockholder, became in need of additional capital." Accordingly, he "determined to sell a substantial portion of his 90,000 shares in Stirling."

The essence of Coenen's claim is that he was victimized by Pressprich and Stirling, who conspired to prevent him from selling his shares on the open market, and forced him "under duress" to sell to Pressprich at a greatly reduced price in September of 1970. Coenen contends that Pressprich made false representations to him as to the transferability of his shares, that Pressprich and Stirling would not accept legal opinions that the shares need not be registered, and that Stirling wrongfully prevented and delayed the removal of the restrictive legend by its transfer agent.

Coenen has taken this relatively simple claim of fraud and has converted it into four separate "Claims For Relief", only three of which are directed against Pressprich. These three claims allege (1) common law conspiracy with Stirling to injure plaintiff by the acts described above (jurisdiction being based on diversity of citizenship); (2) violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; and (3) conspiracy with Stirling to restrain and monopolize trade "in the common stock of Stirling," in violation of sections 1 and 2 of the Sherman Act. The securities and antitrust claims simply reallege by reference the factual allegations contained in the common law claim, and then add conclusory allegations as to violation of the statutes in question.

The Facts Relevant to the Arbitration Issue

Pressprich has been a member corporation of the New York Stock Exchange ("Exchange") since its incorporation in March 1968 (and its predecessor partnership was a member firm of the Exchange). Coenen has been an allied member of the Exchange since December 31, 1970, and

Coenen & Co., Inc., of which Coenen is a principal stockholder and Chairman of the Board, has been a member corporation of the Exchange since such date. In his application to become an allied member, signed and sworn to on November 19, 1970, Coenen, in accordance with Article IX, section 9 of the Exchange's Constitution, pledged that he would "abide by the Constitution [of the Exchange] as the same has been or shall be from time to time amended, and by all rules adopted pursuant to the Constitution . . . ." Article VIII, section 1 of that Constitution provides as follows:

> "Any controversy between parties who are members, allied members, member firms or member corporations shall, at the instance of any such party, and any controversy between a non-member and a member or allied member or member firm or member corporation arising out of the business of such member, allied member, member firm or member corporation, or the dissolution of a member firm or member corporation, shall, at the instance of such non-member, be submitted for arbitration, in accordance with the provisions of the Constitution and the rules of the Board of Governors."

On January 6, 1971, after Coenen had become an allied member of the Exchange, his counsel sent Pressprich a copy of a complaint (substantially identical to that later filed herein) "which we have been instructed to file on behalf of Mr. Coenen against your firm and Stirling Homex," and suggested the possibility of "an amicable settlement." Receipt of this letter constituted the first notice to Pressprich that Coenen intended to assert a claim against it on the basis of the stock sale in question. Pressprich wrote Coenen demanding that the controversy be-

tween them be submitted to arbitration, in accordance with the Constitution and rules of the Exchange. Coenen's response was to commence this action against Pressprich and Stirling, thereby reneging on his pledge to abide by the Constitution and rules of the Exchange calling for arbitration of any controversy between a party who is an allied member of the Exchange and a member corporation.

The Proceedings Below

After service of the complaint Pressprich made a motion, pursuant to 9 U.S.C. § 3 and Article 75 of the CPLR, for an order staying the action as against it until arbitration had been had of the controversy between Coenen and Pressprich in accordance with the Constitution of the Exchange and the rules of the Board of Governors. Despite Coenen's vigorous opposition, Judge Charles M. Metzner of the United States District Court for the Southern District of New York granted the motion in an opinion and order dated April 22, 1971.

Judge Metzner rejected every contention made by Coenen as an excuse for evading his commitment as an allied member of the Exchange to arbitrate "any controversy" with a member corporation. He noted that Coenen's claims were asserted against Pressprich *after* Coenen had joined the Exchange, and that Coenen, a sophisticated person in the securities business, was aware of such claims and of his responsibilities as an Exchange member when he applied for membership. Judge Metzner also ruled that Coenen's claim under the Securities Exchange Act of 1934 was arbitrable, since the contract to arbitrate had been knowingly entered into after the securi-

ties dispute had arisen. Finally, Judge Metzner held Coenen's antitrust claim arbitrable for the same reason. As Coenen knew of his possible claim against Pressprich before he joined the Exchange, his rights were fixed at that time, and under those circumstances an agreement to submit to arbitration, made with full knowledge of the claim, was comparable to settlement. Judge Metzner adhered to his decision on Coenen's motion for reargument.

The Court of Appeals for the Second Circuit unanimously affirmed, agreeing with Judge Metzner on every point. As additional grounds for its conclusion that Coenen could not evade his commitment to arbitrate, the court held that settlement through the Exchange's arbitration machinery of securities law and antitrust claims such as those made by Coenen was consistent with, and in furtherance of, the self-regulatory powers and functions expressly granted by Congress to national securities exchanges. A petition for rehearing *en banc* was denied by the court by a vote of 6 to 3.*

In his present petition, Coenen does not seek review of the conclusion of the lower courts that the broad language of the Exchange's arbitration provision by its terms covers this controversy between a member corporation and an allied member of the Exchange. Rather, he contends that judicial exceptions should be engrafted onto that provision, and that his resort to the federal securities and antitrust

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* Coenen has described the decision of the Court of Appeals as a holding "that the broad arbitration clause of the Exchange constitution in effect afforded Pressprich immunity from concededly valid claims for damages" under the federal antitrust and securities laws. (Pet. p. 4) Similarly, he contends that the ruling permits Pressprich "to conspire with impunity . . . ." (Pet. p. 12) These characterizations are gross distortions of a holding that all of Coenen's claims shall be presented to and determined by arbitrators.

laws as alternate grounds for recovery should succeed in enabling him to by-pass the Exchange and to seek recourse in a judicial forum. He further asserts the irrelevance of his awareness of these claims at the very time that he agreed to be bound by the arbitration provision in question.

Argument

Notwithstanding petitioner's exaggerated contentions about the significance and scope of the ruling below, the issue here posed is an exceedingly narrow one, namely, whether an obligation between stock exchange members to arbitrate "any controversy" will be enforced when the plaintiff's claim arose before, but was asserted after, his admission to exchange membership, and is expressed alternatively in common law, securities law and antitrust terms. The intervention of exchange membership between the dates of accrual and prosecution of a claim is an unusual sequence of events, and one likely to recur most infrequently, if at all. Thus, any ruling by this Court as to the significance of Coenen's failure to sue until after his date of admission will be of extremely limited precedential value.

It is undisputed that Coenen joined the New York Stock Exchange fully cognizant of all his claims against Pressprich, which were based on events occurring during the period from May to September 1970, but which Coenen, for reasons of his own, did not choose to assert until after he became a member on December 31, 1970. In contrast to the situation prevailing when a controversy arises from events occurring after admission to membership, Coenen enjoyed the unique advantage of knowing exactly what

claims he had against an Exchange member at the very time that, through his voluntary action, he nevertheless consented to be bound by the arbitration provision. All that the lower courts here required was that Coenen, having thus chosen to accept the benefits of membership in the Exchange, live up to the agreements flowing from such membership.

In other cases the lower courts have uniformly held that an arbitration agreement knowingly entered into after a claim has arisen should be enforced in accordance with its terms, regardless of whether the claim to be arbitrated contains securities law or antitrust elements. Such a result not only is in accord with the well-recognized federal policy favoring arbitration, but in the present case also implements the mandate of self-regulation, embracing the settlement of disputes among members, expressly given to the Exchange by Congress and the Securities and Exchange Commission. Coenen's position would imperil this self-regulatory scheme by permitting easy evasion of the Exchange's arbitration machinery, thereby compelling judicial involvement in member controversies which should be handled internally.

Thus no important question of federal law for review by this Court is presented by the lower courts' conclusion that Coenen is bound to arbitrate claims of which he had knowledge when the arbitration agreement was consummated. Nor can such a result be attacked as inconsistent with the rulings of other lower courts. Coenen's awareness of his claims at the time of admission to Exchange membership, and his failure despite such awareness to prosecute the claims before joining the Exchange, make clear that this case is a totally inappropriate vehicle for delving

into the general relationship between private actions under the federal antitrust and securities laws, and enforcement of arbitration clauses.

Even assuming—contrary to the fact—that Coenen's claims against Pressprich had arisen after Coenen had joined the Exchange, a ruling compelling arbitration would clearly be correct in view of the status of the disputants as Exchange members, the scope of the Exchange's arbitration clause, and the provisions of the Securities Exchange Act of 1934. The alternative holdings of the Second Circuit to this effect, which were clearly unnecessary to the result reached, afford no valid basis for granting certiorari.

I.

A holding enforcing an arbitration agreement consummated after the accrual of federal claims does not warrant review by this Court.

In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court concluded that § 14 of the Securities Act of 1933 (15 U.S.C. § 77n) (virtually identical to § 29(a) of the 1934 Act (15 U.S.C. § 78cc(a)), voiding any provision for waiver of statutory rights, made unenforceable an agreement by a customer to arbitrate a claim against a securities brokerage firm based on a violation of the 1933 Act. The Court observed that the agreement in question was one "to arbitrate a future controversy," made "prior to any violation of the Securities Act," and thus the plaintiff had been "restricted in his choice of forum prior to the existence of a controversy. While the Securities Act does not require a petitioner to sue, a waiver in advance of a controversy stands upon a different footing." (*Id.* at 430, 435, 438). The

Court specifically pointed out that "we need not and do not go so far" as to void an arbitration agreement entered into "after the creation of a liability". (*Id.* at 438). In his concurring opinion, Mr. Justice Jackson noted that the parties could agree upon arbitration after the controversy had arisen. (*Ibid.*)

Since Coenen's agreement to arbitrate was entered into *after* the creation of the liability, both lower courts held that *Wilko* posed no bar to arbitration of Coenen's second claim against Pressprich, which is predicated upon a violation of § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. In so ruling, they followed the unanimous conclusion of other courts that agreements to arbitrate made after the events giving rise to the controversy are not invalidated under the federal securities laws. *Gardner* v. *Shearson, Hammill & Co.*, 433 F.2d 367 (5th Cir. 1970), *cert. denied*, 401 U.S. 978 (1971); *Moran* v. *Paine, Webber, Jackson & Curtis*, 389 F.2d 242 (3d Cir. 1968); *Moran* v. *Paine, Webber, Jackson & Curtis*, 422 Pa. 66, 220 A.2d 624 (1966); *Reader* v. *Hirsch & Co.*, 197 F. Supp. 111, 116-17 (S.D.N.Y. 1961); Note, 62 Yale L.J. 985, 994-96 (1953). In *Pearlstein* v. *Scudder & German*, 429 F.2d 1136, 1143 (2d Cir. 1970), *cert. denied*, 401 U.S. 1013 (1971), the Court of Appeals observed "that the remedial right of access to the courts after an active controversy has arisen can be waived knowingly in favor of arbitration," and that the "desirable end" of arbitration was "easily compatible with the broad purpose of the [1934] Act."

A similar question was presented by Coenen's third claim for relief, where he embellished his complaint by adding an antitrust count to the common law and securities act counts which form the substance of his first and

second claims. Containing no new factual allegations, the third claim simply repeats and realleges the facts set forth in Coenen's initial claim for relief, and then adds two wholly conclusory paragraphs alleging that the acts complained of constitute a combination or conspiracy in restraint of trade, in violation of Section 1 of the Sherman Act, and a conspiracy and attempt to monopolize, and monopolization, in violation of Section 2 of that Act.

Following the distinction made in *Wilko*, the lower courts have consistently held that any limitation on the arbitrability of antitrust claims is inapplicable when the agreement to arbitrate is made after the committal of the alleged antitrust violation. Indeed, in *American Safety Equipment Corp.* v. *J. P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), upon which Coenen places his principal reliance in his petition (as he did in the lower courts), the court, while holding that pure antitrust claims should not be submitted to arbitration pursuant to a pre-existing agreement to arbitrate, specifically stated that "we do not deal here with an agreement to arbitrate made after the controversy has already arisen. Cf. Wilko v. Swan, 346 U.S. at 438, 74 S.Ct. 192." (*Id.* at 827). Thus, Coenen was hardly "entitled to rely" upon this decision to buttress a belief that his accrued antitrust claims were not made arbitrable by his joining the Exchange. (See Pet. p. 9.)* The Second Circuit noted the inapplicability of its own prior decision in *American Safety* by pointing out that in Coenen's case "the agreement to arbitrate was made after the dispute arose." It based its "affirmance squarely on this ground." (Pet. App. D, p. 21a)

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* The petition misleadingly asserts that "Coenen only agreed to arbitrate any claim that was arbitrable." (Pet. p. 9) What Coenen did agree to arbitrate was "any controversy" with a fellow Exchange member.

In *Power Replacements, Inc.* v. *Air Preheater Co., Inc.*, 426 F.2d 980 (9th Cir. 1970), it was argued that an agreement to arbitrate an antitrust claim should be enforced, on the ground that "since the parties could resolve the dispute by settlement they could also do so by arbitration." (*Id.* at 984) The court noted that "the parties did more than agree to arbitrate existing disputes" and that the alleged antitrust violations forming the basis of the action occurred *after* the agreement to arbitrate was executed. It then held:

> "The analogy to settlement is applicable only with respect to claims in existence at the time of the agreement. The parties knew what claims were then being submitted to arbitration. This is not true as to any possible claim in violation of the antitrust laws which might arise during the ensuing two year period. Nor does the time limitation justify a different rule. Controlling is the fact that the parties agreed to arbitrate antitrust claims which were not in existence and the nature and effect of which were unknown when the agreement was made." (*Ibid.*)*

As both lower courts correctly held, arbitration here represents no more than a method of settlement fashioned by the parties after the claims were known. Indeed, it is of interest that Coenen's counsel mailed a proposed thirteen-page complaint to Pressprich on January 6, 1971, which was only the third working day after Coenen was

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* *See also* Pitofsky, "Arbitration and Antitrust Enforcement," 44 N.Y.U.L. Rev. 1072, 1079-80 (1969), endorsing an exception to a presumption against arbitrating antitrust claims "where the arbitration agreement is entered into after the claim arises." When the events leading up to the controversy have already occurred, there is no risk that a party will be compelled by unequal bargaining power to agree to arbitrate future rights, without knowing what such rights may be.

admitted as an allied member of the Exchange. This sequence clearly indicates that Coenen and his counsel had under active consideration the claim against Pressprich at the very time that Coenen's application to become an allied member was receiving Exchange approval, thereby binding him to obey its Constitution and rules.

II.

The alternative holdings as to the arbitrability of securities and antitrust claims accruing after admission to Exchange membership do not warrant review by this Court.

While the foregoing considerations are dispositive of Coenen's contentions, the Court of Appeals also concluded that Coenen's securities law and antitrust claims should be arbitrable even if they had arisen after he joined the Exchange.* These rulings were unnecessary to the result reached, and it is clear that this Court will not grant certiorari simply to review independent or alternative holdings. Nevertheless, the holdings were manifestly correct, and in all respects consistent with other rulings of the lower courts.

The Second Circuit's holding that the *Wilko* doctrine does not bar arbitration by a national securities exchange of a dispute between its members involving claimed securities law violations is in accord with the three lower court

* We do not understand petitioner's statement that the Second Circuit "conced[ed] the illegality of submitting to arbitration antitrust claims arising subsequent to Coenen's joining the Exchange." (Pet. pp. 8-9) What the court actually concluded is that "it will be a pity if it should ever be [so] held. . . ." (Pet. App. D, p. 22a)

decisions directly in point. *Axelrod & Co.* v. *Kordich, Victor & Neufeld*, 451 F.2d 838 (2d Cir. 1971); *In re Revenue Properties Litigation Cases*, 451 F.2d 310 (1st Cir. 1971); *Brown* v. *Gilligan, Will & Co.*, 287 F.Supp. 766 (S.D.N.Y. 1968). In these cases and the instant case the courts relied upon § 28(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(b)), providing as follows:

> "(b) Nothing in this chapter shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, . . ."

The courts held that this provision by its terms made inapplicable § 29(a) of the 1934 Act (15 U.S.C. § 78cc(a)), voiding any provision for waiver of statutory rights, and had an obvious impact on § 27 of the Act (15 U.S.C. § 78aa), giving the federal courts exclusive jurisdiction over Exchange Act claims.

Such a holding is unassailable, especially when viewed in the context of the broad grant of self-regulation vested in national securities exchanges by the Securities Exchange Act of 1934. "One aspect of the statutorily imposed duty of self-regulation is the obligation to formulate rules governing the conduct of exchange members." *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 353 (1963). Pursuant to this obligation, the Exchange has formulated a rule requiring that members arbitrate controversies between them. The existence and desirability of such a dispute-resolving mechanism have been expressly endorsed by Congress in § 28(b). Moreover, the Exchange has regis-

tered with the Securities and Exchange Commission as a national securities exchange, and has filed with the Commission copies of its Constitution and rules (including the arbitration provisions thereof), which have been found by the Commission to "be just and adequate to ensure fair dealing and to protect investors. . . ." Securities Exchange Act of 1934, §§5, 6(a)(3), 6(d), 15 U.S.C. §§ 78e, 78f(a)(3), 78f(d). Also of relevance is § 6(c) of the Act (15 U.S.C. § 78f(c)), providing:

> "Nothing in this chapter shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this chapter and the rules and regulations thereunder . . . ."

Thus the status of disputants as Exchange members fully justifies, and indeed compels, arbitration before the Exchange of a claim under the federal securities laws, even though an agreement to arbitrate such a claim is not enforceable against a non-member of the Exchange. As the Second Circuit indicated, no different result should be reached because Coenen has tacked on an antitrust claim, almost as an afterthought, to the initial two counts of his complaint. While Coenen now seeks to create the impression that his antitrust claim is the crux of his complaint, his "tossing into [the] complaint . . . a few conclusory phases to give the illusion of a triple damage antitrust claim" (Pet. App. D, p. 22a) is apparent from the face of the document itself. Couching a claim (even one arising after Exchange membership) in antitrust, as well as in securities law, terms should not enable evasion of the arbitration machinery of the Exchange and the statutorily imposed self-regulatory function which it serves. This is especially true since § 29(a) of the 1934 Act, negating cer-

tain arbitration agreements, has no statutory counterpart in the antitrust laws.

If a stock exchange member were permitted to escape his arbitration commitment simply by affixing an antitrust label to his claim against a co-member (even though combined with other theories of recovery), a significant loophole would arise in the scope of the Exchange's arbitration provisions. In many cases it will be no difficult task to weave an antitrust claim into a controversy with another Exchange member. Indeed, a member desiring to avoid arbitration of such a controversy could bring in additional parties, such as employees or other agents of the defendant member, or other members or persons allegedly engaged in joint action with him. The standard "conspiracy" and "restraint of trade" allegations, as applied to conduct by more than one person, and perhaps as part of a multi-count complaint, should enable a skillful pleader to withstand a motion to dismiss, and thereby accomplish his objective of forestalling arbitration. The Second Circuit was understandably reluctant to create this kind of gap in the well-defined scheme of Exchange self-regulation.

It also seems pertinent that while Coenen vigorously resists arbitration, the factual questions presented by the present controversy would seem to be the very matters upon which the expertise of a panel of five arbitrators, consisting of members and allied members of the Exchange, could profitably be brought to bear (see N.Y.S.E. Const., Art. VIII, §§ 4, 5). By no stretch of the imagination can Coenen's claim be held to involve complicated issues of law or of fact, assuming such compelling public importance that their resolution should not be entrusted to the Exchange's internal processes. We are at a loss to understand why Coenen, himself a professional in the se-

curities business, is so eager to embroil the courts in this dispute, and so reluctant to have his claim against a broker-dealer firm arising out of a securities transaction adjudicated by other such professionals.

Thus, neither the principal nor the alternative holdings of the Court of Appeals justify the grant of the petition. Nor is any question here presented (which would in any event be unique to Coenen's situation) as to "whether or not an exchange may lawfully require an applicant to waive his claims under the securities laws and antitrust laws as a condition precedent to membership" (Pet. p. 15). The decisions below do not require Coenen to relinquish any claims against anyone. They simply provide that, in accordance with the agreement knowingly made by him, his claims shall be adjudicated by a panel of arbitrators chosen pursuant to the Constitution and rules of the Exchange, rather than by the federal judiciary. As Judge Metzner observed (Pet. App. B, p. 7a), a different case would have been presented had Coenen chosen to commence litigation against Pressprich during the three-month period which intervened between the accrual of his cause of action and his admission to Exchange membership.

Coenen's astonishing statement that "the ruling is a *de facto* acquittal of one of two co-conspirators charged to have committed serious offenses under federal laws" (Pet. p. 17) can be interpreted only as an unwarranted slur on the integrity of the Exchange's arbitrators, or a realistic admission of the total lack of merit in his claims. In any event, having knowingly pledged to abide by the Constitution and rules of the Exchange, he cannot now belatedly complain of the alleged infirmities in its arbitration process. *Garfield & Co.* v. *Wiest*, 432 F.2d 849 (2d Cir. 1970), *cert. denied*, 401 U.S. 940 (1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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